

IN RE ARBITRATION BETWEEN:

AFSCME, COUNCIL 5

and

STATE OF MINNESOTA – ANOKA METRO REGIONAL TREATMENT CENTER

DECISION AND AWARD OF ARBITRATOR

BMS CASE # 06-PA-219

JEFFREY W. JACOBS

ARBITRATOR

March 1, 2006

IN RE ARBITRATION BETWEEN:

AFSCME Council 5,

and

State of Minnesota – AMRTC,

DECISION AND AWARD OF ARBITRATOR
BMS CASE # 06-PA-219
Soderquist Grievance matter

APPEARANCES:

FOR THE UNION:

Chris Cowen, Business Agent
Cora Soderquist, grievant
Kelly Schmidtbauer, LPN
Angela Folden, HST

FOR THE EMPLOYER:

Valerie Darling, Labor Relations Representative, DOER
Carolyn Trevis, Labor Relations Representative, DOER
“Sally,” former patient AMRTC
Dave Hartford, Hospital Administrator
Robin Anderson, Investigator
Brooke Peterson, HST
Nena Altobelli, HST

PRELIMINARY STATEMENT

The above matter came on for hearing on February 17, 2006 at 9:00 a.m. at the Anoka Metro Regional Treatment Center in Anoka, Minnesota. The parties presented their evidence and the record was closed at that time. The parties waived Briefs and submitted the matter on oral argument. A protective order was issued regarding the identity of the patients or former patients of the facility and that any information that may be used to identify them not leave the confines of this proceeding.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from July 1, 2005 through June 30, 2007 and agreed that this was the agreement in effect at the time of the grievance. Article 17 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. There were no procedural arbitrability issues raised and the matter was stipulated to be properly before the arbitrator.

ISSUES PRESENTED

The parties stipulated that the issue was whether there was just cause to terminate the grievant and if not, what shall the remedy be?

PARTIES' POSITIONS

STATE'S POSITION:

The State's position was that the discharge was for just cause for the financial exploitation of vulnerable adults, VA's. In support of this the State made the following contentions:

1. The facility where the grievant worked is one that deals with adults with developmental disabilities. These are VA's as defined by law and must be treated as such. Accordingly, any abuse of VA's including the financial exploitation of them is a very serious matter under both State policy guidelines as well as State law.

2. The grievant was well aware of these policies and received training on an ongoing basis on the Vulnerable Adult Act and the policies pertaining to it. Thus there is no question that the grievant knew of the policy and the law against any sort of verbal or physical abuse of the adults in the program. There is further no question that the individuals involved in this matter were VA's in accordance with State law and policy.

3. The Anoka RTC facility is a secure locked facility where patients are mostly Court ordered to complete drug and alcohol rehabilitation and recovery. The patients are VA when they are in the facility.

4. By State law, no one, including the patients, are allowed to smoke or otherwise use or consume tobacco products while on facility grounds. This of course includes the staff as well. See Minn. Stat. 246.0141, State Tab 9.

5. The State noted that after the passage of this law, there arose a disturbing black market for tobacco products and cigarettes within the facility and that cigarettes can sell for 5 or even 10 dollars per cigarette. The State alleged that this became a serious problem and made for a situation ripe for financial exploitation of the patients by other patients and staff.

6. The State became aware that the grievant was selling cigarettes when a patient reported to a staff person that she had seen the grievant pass cigarettes to another patient in late March of 2005. the patient reported that she was walking in the facility when she saw the grievant, whom she did not know at the time, pass cigarettes to a patient. Her statement is at Tab 13 of the State's book.

7. Based on this report, the State commenced an investigation to determine the truth of the allegations. Investigators interviewed the grievant, Sally, the patient who alleged that she saw the grievant pass cigarettes to another patient as well as several other patients regarding the allegations. Based on this, it was clear that the grievant was the person Sally saw that day.

8. The State further argued that patients "Sally" and "Mary" took great risks in coming forward. Mary identified the grievant as the cigarette lady not because she wanted to get her into trouble for some personal reason but merely because Mary had heard that a program with which Mary was familiar and liked may be canceled due to allegations that people on that program were bringing cigarettes in. Mary did not bring this forward until after she was out of that program.

9. Sally was roommates with the person she identified as the grievant's accomplice in selling cigarettes. In a facility like this, word travels fast as to who is a snitch. Anyone coming forward with information like this is taking something of a person risk. Thus both Sally's and Mary's testimony can be considered quite credible if for no other reason than this. Neither Sally nor Mary had much if any contact with the grievant and there was no reason shown for them to fabricate this story.

10. In addition, the investigators determined that the grievant was known as the "cigarette lady" around the facility and was identified by other patients as a staff person who brought cigarettes into the facility and sold them to patients.

11. The State alleged that even though the grievant has always maintained her complete innocence in this the statements of the patients who did identify her were credible and that the evidence in this matter shows that the grievant did in fact bring cigarettes into the facility and sold them to patients in clear and direct violation of facility policy and State Law.

12. The State noted that the Union did not take issue with the policy nor with the evidence that the grievant knew the policy and of its consequences. The State further argued that termination is the only outcome here. One other staff person was found to have brought tobacco products into the facility and was terminated.

13. Finally, the State argued that the patients of the facility are vulnerable adults within the meaning of the Vulnerable Adult Protection Act, Minn. Stat. Ch 626.557 et seq. As such, financial exploitation of them is a clear violation of this statute and the clear facility policy. Thus, the State argued, if the arbitrator finds that she was in fact guilty of violating the policy, termination is the only appropriate remedy.

14. The essence of the State's argument thus is that the overwhelming evidence showed by a thorough and fair investigation that the grievant did in fact bring cigarettes into the facility with the intent of selling or giving them to patients in clear violation of policy and law and that the only remedy possible here is her termination.

The State seeks an Award denying the grievance and sustaining the discharge of the grievant.

UNION'S POSITION

The Union's position was simply that the grievant did not engage in the conduct she was accused of and has not ever sold or given cigarettes or tobacco products to patients. In support of this the Union made the following contentions:

1. The Union's position was quite simple: the grievant did not do it. The Union and the grievant maintained throughout the proceeding including the grievance steps that she did not bring cigarettes into the facility and was not the "cigarette lady" as alleged.

2. The Union further argued that the investigation was flawed in several ways. First, the investigators never talked to the grievant's co-workers to determine her credibility. If they had, they would have found that she is regarded as a very reliable, credible and hard-working individual who would never do what has been alleged here.

3. Further, the Union argued that most of the State's case is unreliable hearsay. If one looks at the bulk of the information in State Tab 13, the investigative report, one finds that most of the patients did not identify the grievant as the person or even a person who brought in cigarettes.

4. Moreover, the statements of the one person who allegedly saw the grievant pass cigarettes to a patient could not even positively identify the grievant as the person who did so. When interviewed by investigators, she was shown only one picture, the grievant and asked if she was the person she saw. This after Sally had already said she walked by very quickly, glanced for a fraction of a second at best at the alleged transaction, never saw money change hands and could only say that she thought she saw a pack of cigarettes, possibly Newports or Cools as the box appeared to be light green.

5. The Union argued that a termination must be based on far more than unreliable hearsay evidence from patients who are at best somewhat unreliable in their own testimony.

6. Further, the Union argued that there is no "smoking gun" here. There is no cache of cigarettes or money that was found and no hard evidence that the grievant is guilty of this. The State never found cigarettes on the grievant's person and produced only one eyewitness whose testimony is suspect at best.

7. The Union argued further that there are many people who have and perhaps even are bringing tobacco products into the facility. One patient interviewed by the State's investigators indicated that she got her cigarettes from another patient's visitor. She never identified the grievant as the person who brought her cigarettes. The Union argued that the patient knew that she could get into trouble for saying this as it is clear policy that tobacco is prohibited thus making her statements all the more reliable.

8. The Union argued too that the State bears the burden of proof here and that a case for termination must rest on more than second and even third party hearsay, as it largely does here. The State's case falls far short of that requirement according to the Union.

9. The Union argued finally that the grievant is a very kind person who does sometimes give small treats or things to patients and that this may well be what Sally saw that day. Moreover, the grievant has reported some patients' use of tobacco and that this too may have gotten her into trouble with some patients.

10. The essence of the Union's case is thus that the grievant is innocent of these charges, did not nor never has sold or given tobacco products of any kind to patients at the facility ever and that the State's case simply falls short of the burden of proof necessary to impose the supreme industrial penalty of dismissal.

The Union seeks an award sustaining the grievance and reinstating the grievant to her former position with all back pay and accrued contractual benefits.

MEMORANDUM AND DISCUSSION

The parties could not have diverged more in their assessment of this matter. This is a classic case of conflicting testimony and allegations and is perhaps the most difficult for any arbitrator to decide. Yet decide it I must and a very thorough review of the evidence and the testimony was necessary to be certain of the right result here.

The AMRTC is a locked State operated facility treating patients with chemical dependency and addiction related issues. The patients are considered Vulnerable Adults within the meaning of the Vulnerable Adult Protection Act, Minn. Stat, 626.557 et. seq.

Neither was there any dispute between the parties as to the facility policy with respect to the possession or use of tobacco products by staff and patients alike. It is prohibited both by policy as well as State law. There was also agreement that the policy was communicated to the grievant and to the other staff at the facility as well as the patients and that everyone concerned knew well what the policy was and the potential consequences if one was caught violating it.

The issue is whether the grievant did what was alleged. She maintained her innocence throughout the hearing and throughout the grievance procedure with the State's investigators. The State equally adamantly maintained that the evidence against the grievant is overwhelming and that there are two eyewitnesses to the grievant's actions as well as fairly strong corroborative circumstantial evidence to support the State's allegations.

The Union argued that much of the State's case is based on unreliable hearsay from patients who are themselves unreliable and even downright veracitudoinally challenged. The Union asserts that some of these patients simply lie about things. The Union pointed out that the patients who supported the State's claims were deemed "credible" by investigators while those that did not or failed to identify the grievant as the person selling cigarettes were deemed not credible. The Union alleged that this is hardly an indication of a fair and unbiased investigation.

The Union further noted that the interviews with patients Dick, Jane, Harry and Tom failed to produce anything that could link the grievant with cigarettes. In fact, according to the Union, it produced quite the contrary. Dick did not identify the grievant but rather fingered patient Jane who was selling cigarettes. He did not know where she got them.

Harry similarly did not identify the grievant and simply indicated that he would not tell even if he did know. It was clear from the evidence that Harry knew something but was unwilling to give it up. Harry did not identify the grievant as the person selling cigarettes.

Tom confirmed that cigarettes were being sold at fairly high prices but that he did not know who was selling them. There was some indication that he was being facetious when giving his answers but it was unclear what that meant. He may well have known that cigarettes were being sold and/or traded in the facility but without more, it cannot be said that Tom identified the grievant as the person selling the cigarettes.

Jane was somewhat combative in her interview and essentially claimed that the investigators could not prove anything. She indicated that she was getting cigarettes but from “another patient’s visitor” as the one bringing them in. She denied selling them and did not identify the grievant as the person selling the cigarettes. The evidence did show that the dresser drawer in Jane’s room had been modified consistent with Sally’s testimony set forth below to allow room to store something and that cigarettes could well have been placed there although there was no evidence that cigarettes were found there upon a search of her room.

Jim denied buying cigarettes from staff and again identified Jane as the person from whom he bought his cigarettes. Jim apparently was caught with cigarettes and a large amount of cash in his possession. There was however no indication that he knew the grievant was selling cigarettes and denied buying them from her.

Frankly, if the State’s case were based solely on the strength of the evidence garnered from Jane, Dick, Jim, Harry and Tom, the case would be over and the grievant would likely be returning to work. The statements from these individuals produced nothing in the way of substantive proof that would even tend to link the grievant with these allegations. Such evidence would not in all likelihood provide sufficient basis of discipline much less discharge.

However, in this matter there is also the testimony of Mary and Sally. From this evidence the picture becomes a bit clearer. Mary indicated that she came forward, apparently independently from Sally, because she, Mary, had heard that administration was not going to allow patients to attend the so-called Cronin program due to security concerns. Mary wanted people to know that the problem was not there but rather on the hospital side, where the grievant was employed. Mary related that Jane sold cigarettes and that she got them from the grievant.

There was some hearsay in Mary's statement but there was also some direct testimony about what she allegedly saw as well. Most important to this discussion is the statement that the grievant frequently visited Jane and that the grievant sold cigarettes to Jane, presumably for re-sale by Jane to other patients in the facility. It should be noted that Jane was identified as a person from whom one could buy cigarettes.

Mary also indicated that Jane hid cigarettes in her desk drawer. Staff later verified that the drawers could be pulled out and that there was a small space there for "secret" or at least less detectible storage. Mary reported that Jane would frequently say that she had money for the grievant. Mary was apparently subpoenaed to testify but failed to appear so while her statement contains some relevant information, it does not carry the weight that it otherwise would if she had testified to these things live and been subject to cross examination.

Still though her statement and the testimony regarding it by the State's investigator provided a compelling scenario which pointed very much in the direction that the grievant was bringing cigarettes into the facility for sale. The arbitrator is not unmindful of the difficulties in getting witnesses to come forward in a setting such as this. There was some evidence to suggest that people were fearful of some form of retribution from staff or other patients if they "snitched." Given the amount of money that was apparently changing hands in this illicit cigarette trade that is not surprising. Such facts however, add some measure of credibility to Mary's statement. Mary took considerable risk in coming forward and fingering her former roommate without knowing the consequences.

The most compelling piece of evidence was of course that from Sally. She remained resolute in her statement and in her testimony that she in fact saw the grievant pass cigarettes to a patient sometime in late March of 2005. The Union attempted to shake her recollection of these facts but was unsuccessful. Sally's testimony was compared to her earlier statement given to investigators. While there were some very minor variations, her testimony was quite consistent all along.

She testified that she thought she had been in the unit “about a month” when she saw the incident involving the grievant giving cigarettes to another patient in the hallway. This is entirely consistent with the documentary evidence in the matter. She came on the unit on March 1, 2005; gave her statement to investigators on April 6, 2005 and indicated that she thought the incident occurred 2 to 2 ½ weeks prior to the interview.

The Union attempted to shake Sally’s testimony by pointing out that she never saw actual money changing hands. A close review of her earlier statement reveals that she never said she saw money changing hands - she clearly did say that she saw cigarettes changing hands. That of course is the violation here, whether money changed hands or not. The law and policy speaks in terms of possession and use of tobacco and while it is contrary to human experience to assume the grievant was merely giving the cigarettes to the patient, that fact is immaterial to the discussion here. The weight of the evidence shows that the grievant had cigarettes and gave them to a patient. Sally testified that she walked by quickly after observing this. The money could easily have changed hands later.

Taking the evidence as a whole, this inexactitude is not fatal to her testimony or her credibility. It is this testimony that carries the day for the State here. Sally gave credible and consistent testimony about what she saw. She too took tremendous risk in coming forward and reporting this to a staff member. Further there was no showing that the grievant or Sally had ever known each other prior to this. Certainly there was no showing that Sally had any incentive to fabricate the story or to get the grievant in trouble.

The Union argued that the discipline notice was flawed since it did not specifically reference the person to whom Sally saw the grievant give cigarettes in the hallway in March of 2005. If it had been shown that this was the first time grievant saw this allegation or that the State had somehow intentionally hidden that information for the Union there may again be a very different result. However, there was no showing of that and the Union’s objection to this is a technical one at best. This allegation was not shown to have been a surprise to anyone.

The evidence as a whole showed that the grievant and Union knew about Sally's allegations and the details of them during the grievance steps leading up to the hearing in the matter. This fact alone does not mitigate sufficiently in favor of grievant to override the evidence that she did in fact give cigarettes to the patient as alleged by Sally in her statement and her testimony.

The Union also raised a concern regarding the investigation process and argued that it was unduly biased toward the grievant. This was specifically directed at the fact that the investigator showed only the picture of the grievant to Sally and asked if that was the person she saw. Arguably it would have been far better to have selected several pictures of staff people with similar physical characteristics and had there been a showing that there were other staff people fitting the grievant's description who could possibly have been the person Sally said she saw, the result might again have been different. There was no such showing however. Moreover, the State produced evidence that the grievant was the only person on that unit at that time that could have even remotely fit the description of the grievant. Sally's description of the grievant, made before she was shown the pictures, is entirely consistent with the grievant's physical characteristics. Again, taking the evidence as a whole, the State has carried its burden under these unique facts and circumstances that the grievant was indeed the person Sally saw handing cigarettes to a patient.

The Union also raised the concern that the State's investigation did not extend to interviews of the grievant's co-workers. They brought forth two witnesses who testified credibly that they had never seen the grievant sell or give tobacco of any kind to anyone and further testified to her good character. The Union claimed that the investigation was flawed since it did not include these individuals.

These witnesses were not in fact with the grievant at all times when she was working. Moreover, although one witness indicated that when she worked with the grievant she was within eyesight of her almost all the time, she did not work with the grievant on every shift. The other Union witness did not work with the grievant on every shift either and could not say that she was with her all the time when she did.

The difficulty for the Union here is that while these witnesses were credible they could not prove the negative. The testimony from the State's witnesses was convincing that the grievant did possess and/or sell cigarettes and while the Union witnesses never saw her do that, they could not give any testimony that undermined the credibility of the State's evidence. The fact that they were not interviewed does not under these facts render the investigation so flawed as to warrant overturning the discipline in the face of credible evidence to demonstrate the grievant's actions in this matter.

Finally, it should be noted that the main defense to the action was that the grievant simply did not do it and that there was insufficient evidence to prove that she did. There was no claim that the policy was laxly enforced or that the grievant should be allowed back to work for some other reason. Neither was there any actual showing that any staff or patients had any incentive to fabricate these stories or that they had any personal animus toward the grievant that would have provided a basis to accuse her of these acts. In fact, the grievant made only the most general statement about how she may have reported someone in the past and that that may have been the basis for this. Without more, the allegation that there was some sort of conspiracy was unsupported by the evidence in this matter.

Having made the determination based on the evidence as a whole that the grievant was the person who gave cigarettes to a patient there is little discretion left to the arbitrator in determining the result. While there was only a somewhat fuzzy showing that the grievant was the "cigarette lady" there was very clear and convincing evidence that she gave cigarettes to the patient as Sally claimed. Under these circumstances that is enough.

Thus, while the grievant vehemently denied the allegations the record on the whole supports the conclusion that she did either give or sell cigarettes to a patient in the facility. This type of exploitation of patients in a locked facility such as this must be treated with the utmost seriousness. Accordingly, the discharge must on this record be sustained and the grievance ultimately denied.

AWARD

The grievance is DENIED. Pursuant to Article 17, Section 2, D Step 4, the Union shall bear the costs of the arbitrator's fee as set forth in the statement attached to this Award.

Dated: March 1, 2006

Jeffrey W. Jacobs, arbitrator

State of MN – AMRTC - Soderquist